In the Supreme Court of the United States

OCTOBER TERM, 1978

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-1693

UNITED STATES OF AMERICA

v.

GLEN M. CLARKE, ET AL.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

MUNICIPALITY OF
ANCHORAGE
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The Municipality of Anchorage opposes the Petition for a Writ of Certiorari and requests that this Court decline to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

JURISDICTION

The Municipality of Anchorage concurs with treatment of this issue by the United States.

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that if the laws of the state allow lands to be taken for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal condemnation proceedings which precede the taking, 25 U.S.C.A. § 357 allows lands allotted in severalty to Indians to be condemned for public purpose through inverse condemnation or taking in the nature of inverse con-

demnation, as well as by formal condemnation proceedings?

STATEMENT OF THE CASE

The United States attempts to categorize the controversy concerning the roadway across Mrs. Tabbytite's land as a feud between two homesteaders on a remote mountain top in frozen Alaska; the principal issue, seemingly, whether one homesteader, Clark, could obtain the right to maintain a road to his homestead by continued trespass across the lands of his neighbor. This is misleading. The real issue before this court is whether a road which was heavily used as a public city street wholly within city boundaries between 1961 and 1975, indeed the main street of the city, and a publicly maintained municipal roadway since 1975 within the Municipality of Anchorage, a modern city encompassing at least half of the population of the State of Alaska, has been taken for public use through inverse condemnation or taking in the nature of inverse condemnation.

UNDISPUTED ISSUES OF FACT

1. Glen Alps was incorporated as a third-class city by order of the Superior Court, Third Judicial District, Alaska Case No. 61-60, on June 8, 1961. It encompassed all of Section 30, Township 12 North, Range 2 West. (A certified copy of the Order is found at R: 61-62).

2. Immediately after incorporation, the City maintained and used the road crossing Section 30, including that portion crossing Mrs. Tabbytite's property, as a public road; snow plowing it in the winter and grading it in the summer. (TR: 69). The road crossing Mrs. Tabbytite's

property was fully within Section 30, the City boundaries. (Plaintiff's Exhibit 8).

3. Between 1955 and 1966, Mrs. Tabbytite was a homestead entrywoman without patent. On February 24, 1966, she relinquished her homestead rights. (Plaintiff's Exhibit 5). On June 9, 1966, she was granted an Indian allotment. (Original Record: 239; Plaintiff's Exhibit 7).

4. The road across Mrs. Tabbytite's land was maintained and used as a public, city road between the time of the City's incorporation in 1961 until unification in September, 1975. It was the main street of the City. (TR: 222-223, 230, 238).

5. Prior to September 16, 1975, the City of Glen Alps was situated within the geographic boundaries of the Greater Anchorage Area Borough. Other cities existing within those boundaries were the City of Anchorage, a home rule city, and the City of Girdwood, a first-class city, organized under the laws of the State of Alaska. The Greater Anchorage Area Borough was a municipal corporation organized under the laws of the State of Alaska and constituted a form of regional government, roughly an analagous to a county.

On September 9, 1965, the voters approved a home rule charter which unified all existing governments into a single home rule entity and dissolved the former cities and the Greater Anchorage Area Borough. The election results were certified on September 16, 1975. Such action was taken pursuant to the Alaska Statutes.

Pursuant to these provisions, as well as the Anchorage Municipal Charter which was enacted on September 16, 1975, the unified government succeeded to all rights, titles,

actions, suits, franchises, contracts and liabilities of the former cities and borough. The former cities, including the City of Glen Alps, became service areas within the Municipality for provision of services formerly provided within their boundaries. (Motion requesting substitution of Municipality of Anchorage for City of Glen Alps as a defendant, Memorandum in Support of Motion to substitute Municipality of Anchorage for defendant City of Glen Alps, Affidavit of Richard A. Weinig, Entry of Appearance of Municipality of Anchorage, Affidavit of Phyllis Eileen Banks, Home Rule Charter for the Municipality of Anchorage, Anchorage Assembly minutes of September 16, 1975, filed with the Ninth Circuit Court of Appeals on March 15, 1976, in No. 74-1659).

6. Since unification on September 16, 1975, the road in question has been maintained and used as a public road of the Municipality of Anchorage. (Affidavit of David McClelland, R: 63).

7. The United States conceded, on Page 3 of Appellant's Brief to the Ninth Circuit Court of Appeals:

> There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, authorizes the state of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road.

ISSUE OF LAW

Since Alaska case law allows condemnation by formal condemnation proceedings *or* a taking in inverse condemnation *or* a taking in the nature of inverse condemnation does a taking by the Municipality of Anchorage for public

purposes through inverse condemnation or in the nature of inverse condemnation satisfy the statutory authorization to condemn lands allotted in severalty to Indians contained in 25 U.S.C.A. § 357? If so, the Municipality of Anchorage is eager to proceed to trial in this action, upon the issues of what just compensation is due to Mrs. Tabbytite and of trespass damages which may have been incurred prior to the date of taking. Indeed, it has been willing to do so since 1976. (R: 30, 60).

ARGUMENT

CRITERIA OF SUPREME COURT RULE 19

The Ninth Circuit Court of Appeals judgment in this case hardly meets the criteria which would warrant issuance of a Writ of Certiorari set forth in Supreme Court Rule 19:

1. It is not a judgment in which a state court has decided a federal question of substance.

2. ,It is not a judgment from a court of appeals which is in conflict with any other circuit.

3. It does not involve an important state question in a way in conflict with applicable state law.

4. It does not deal with a compelling issue of federal law "which has not been, but should be, settled by this court". Rather, it involves the simple interpretation of an unambiguous statute (25 U.S.C.A. § 357) and well established federal and Alaska law concerning takings in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-3 (9th Circuit 1973); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *Wickwire v. City and Borough of Juneau,*

557 P.2d 783 (Alaska 1976); See *Hurley v. Kincaid,* 285 U.S. 95, 104-105 (1932).

5. The Ninth Circuit's opinion is not in conflict with applicable decisions of this Court.

6. Nor has the Ninth Circuit Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

ARGUMENT ON THE MERITS

The Municipality of Anchorage concurs fully with the Ninth Circuit's opinion in this case which is reported at 590 F.2d 465 (1979).

CONCLUSION

The petition for a writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v. No. 77-2571
OPINION

GLEN M. CLARKE, et al.,

Appellees,

Appeal from the United States District Court
for the District of Alaska

Before: WRIGHT, KENNEDY, and TANG, Circuit Judges.

KENNEDY, CIRCUIT JUDGE:

The United States filed this trespass suit as the owner in fee title of property held in trust after its patent to an Indian by allotment. See U.S.C. §§ 331-332. A complete background of the case is set forth in our earlier opinion, *United States v. Clarke,* 529 F.2d 984 (9th Cir. 1976). The dispute concerns a road that was built on property of the Indian owner by a private party. The private owner's in-

terest in the road later was transferred to a political subdivision of the State of Alaska.

In this phase of the proceedings, the United States sought in injunction against use of the road, claiming that the State of Alaska or a political subdivision may not acquire an interest in Indian lands held in trust except by eminent domain and that an injunction should be granted until eminent domain proceedings are commenced. The trial court denied the injunction, reasoning that the land had been the subject of an inverse taking and the public has the right to use the road after its acquisition by this means, the property owner being limited to an action for compensation resulting from inverse condemnation. The court granted partial summary judgment and denied injunctive relief, and the latter ruling is the subject of this appeal.[1]

A state is allowed by federal statute to take Indian land by condemnation, 25 U.S.C. § 357. The sole issue on appeal is whether or not the statute extends to takings by inverse condemnation as well as by the affirmative exercise of the eminent domain power. We agree with the district court that the statute permits a state to take Indian land by paying compensation in an inverse condemnation action.

The statute in question provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be

[1]The appellees seek review of the district court's denial of an earlier motion for partial summary judgment. Assuming the order was an appealable one, a timely notice of appeal was not filed. Therefore, the propriety of this order will not be addressed.

condemned, and the money awarded as damages shall be paid to the allottee." The argument of the Government that the statute does not include inverse takings is based principally on *Minnesota v. United States,* 305 U.S. 382 (1939). There the Supreme Court held that the United States is an indispensable party in state actions to condemn any trust property and that such actions must be brought exclusively in the federal courts. We think that case is simply inapposite to the issue before us. There was no occasion there for the Court to consider the propriety of inverse condemnation suits, since the eminent domain action was instituted by the state. The reason for requiring the condemnation suit to be heard in a federal court is irrelevant to whether the United States may, on behalf of the Indian owner, maintain an inverse condemnation action. The Court noted that Indian land under trust allotment is a subject within the exclusive control of the federal government, and that "the judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts." Id. at 389 (footnote omitted). Whether the proceeding is for inverse condemnation or for eminent domain, the federal court may maintain control over the action to comply with the policies of *Minnesota.*

We think once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking. As the Alaska Supreme Court noted in an analogous situation:

> The property has already been taken. It would serve no useful purpose to insist now that the state must in-

> itiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

Department of Highways v. Crosby, 410 P.2d 724, 729 (Alaska 1966).

The Government argues that the statute permitting condemnation should be limited to direct condemnation to avoid clouding title to trust lands, thus increasing protection for Indian allottees. It suggests that such clouding will occur any time the state or a political subdivision trespasses upon the property as, such in this case, by building a road across it. We do not think this a persuasive reason for accepting such limited interpretation of the statute. To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing inverse condemnation suits will encourage states and political subdivisions to act with more circumspection, not less, when governmental activities conflict with ownership rights of Indian

trust lands. And our holding certainly does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass of a private or public entity.

The United States further contends that our holding will require it to make frequent and expensive inspections of these lands for possible acts of inverse condemnation. We think, however, that if an intrusion is of such severity that it constitutes an inverse taking the matter will come to the attention of the Indian allottee and the Government.

Congress had declared that the taking of trust lands for public use is to be governed by the laws of the state in which the property is found. We see no reason to ignore this mandate simply because the taking is reviewed in an inverse condemnation action rather than by a direct condemnation suit.

There appears to be unresolved questions in this case, including, among others, the date and extent of the taking and the operation of the applicable statute of limitations. These matters remain before the lower court. We hold only that section 357 of 25 U.S.C. does not preclude actions against states or their political subdivision, according to the law of the state, for inverse condemnation. Accordingly, it does not appear that the plaintiff will prevail in its prayer for injunctive relief and the district court was correct to deny the injunction pending the suit.

The order denying the injunction is affirmed and the case is remanded for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

BERTHA MAE TABBYTITE,

Intervenor, No. A-69-69

GLEN M. CLARKE, et al., CIVIL

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on the Municipality's second motion for partial summary judgment. The issue presented is whether the use of plaintiff's land without the benefit of formal condemnation proceedings is proper under the theory of inverse condemnation to comport with 25 U.S.C. § 357. As the court holds that such a condemnation sufficiently fulfills the mandate of that statute, it need not reach several other issues raised by the motions.

The facts of the case show that the Municipality of Anchorage as a successor in interest to the City of Glen Alps has used a portion of the plaintiff's land for public pur-

poses. This use has taken place without the benefit of formal condemnation proceedings. The plaintiff seeks, *inter alia,* an injunction which will prohibit such use until a formal condemnation has occurred. The Municipality asserts that plaintiff's right to sue for inverse condemnation precludes such an injunction.

The court first turns to the statutory authority for the Municipality's claim of inverse condemnation. 25 U.S.C. §357 states:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned ..."

The Municipality contends that a taking without formal condemnation proceedings is a proper condemnation in Alaska and may be utilized under this statute. It is clear from the wording of the statute that state law is to govern the propriety of the condemnation proceedings. *Necodemus v. Washington Water Power Co.,* 264 F.2d 614, 617 (9th Cir. 1959). Under Alaska law the acts of the Municipality were in the nature of inverse condemnation. *State, Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (1966). It is well settled in Alaska that a taking under such circumstance is a proper exercise of the power of eminent domain and that only the failure to provide just compensation is unlawful. *Id.* at 728, see also 6A, *Nichols on Eminent Domain,* § 28.3, p. 28-84. The remedy of an injunction, therefore, is barred as the suit for damages is exclusive. *Id.* at 728-29; *Wickwire v. Juneau,* Ak. Sup. Ct. Slip op. at 3 (December 6, 1976); see also *Nichols supra* at 28-85. Such a construction is consistent

with the apparent intent of this statute which puts Indian lands on the same footing as other lands with respect to condemnation proceedings.

The plaintiff's assertion that *Minnesota v. United States,* 305 U.S. 32 (1939) requires a formal condemnation proceeding is not well taken. The issue in that case was a narrow jurisdictional question and the rational is not applicable to the present action.

Although the plaintiff is relegated to her action for damages from the inverse condemnation she is also entitled to her common law trespass damages for the use of lands prior to unification. *Cf. Nichols, supra,* at 28-74 & 28-80.

Accordingly, IT IS SO ORDERED.

THAT defendant's motion for partial summary judgment is granted.

DATED at Anchorage, Alaska, this 7th day of April, 1977.

James A. von der Heydt
United States District Judge

cc: United States Attorney
Municipal Attorney
Bertha Mae Tabbytite, Vincent Vitale
Randall E. Farleigh
J. L. McCarrey, Jr.
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